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## WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

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### **2001 Senate Bill 54**

### **Assembly Substitute Amendment 1, as amended by Assembly Amendments 1 and 2**

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Senate Bill 54 creates a moratorium on the discharge of dredged or fill material into nonfederal wetlands in Wisconsin. Assembly Substitute Amendment 1, as amended by Assembly Amendments 1 and 2, is identical to Assembly Bill 215, as amended by Assembly Amendments 1 and 3.

### **PROHIBITION AGAINST DISCHARGES INTO NONFEDERAL WETLANDS**

Under Assembly Substitute Amendment 1, no person may discharge dredged or fill material into a nonfederal wetland. For purposes of the prohibition, a “nonfederal wetland” is a wetland to which the federal discharge permitting process under 33 U.S.C. 1344 [sec. 404 of the Clean Water Act] does not apply due to the *SWANCC* decision of the U.S. Supreme Court, but to which that permitting process did apply on January 8, 2001.<sup>1</sup>

### **EXEMPTIONS**

Assembly Substitute Amendment 1 includes four exemptions from the prohibition against discharging dredged or fill material into a nonfederal wetland. (Under *Assembly Amendment 2* to the substitute amendment, the prohibition expressly does not apply to a person who discharges dredged or fill material into a nonfederal wetland if any of the four exemptions apply.) Assembly Substitute Amendment 1 contains the following exemptions:

1. The prohibition does not apply if the discharge is authorized by a state or local permit or other approval under specified regulatory programs in state law. Under Assembly Amendment 2, this exemption is limited to a person who has received notification from the

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<sup>1</sup> The Supreme Court issued its decision in the *SWANCC* case (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, No. 99-1178 (U.S. Jan. 9, 2001)) on January 9, 2001. Additional information on this decision is available in Legislative Council Legal Memorandum LM-2001-1, *U.S. Supreme Court Case on Wetlands*, January 25, 2001.

Department of Natural Resources (DNR) that the discharge is authorized by a state or local permit or other approval under specified regulatory programs in state law

2. The prohibition does not apply if the discharge of dredged or fill material into a nonfederal wetland is not subject to a state or local permit or other approval requirement under the specified regulatory programs in state law and if the discharge would have been exempt on January 8, 2001 from ch. NR 103 water quality standards based on existing exemptions in ch. NR 103. Under Assembly Amendment 2, this exemption is limited to a person who has received notification from the DNR that the discharge is authorized by a state or local permit or other approval under specified regulatory programs in state law, and the discharge would have been exempt from ch. NR 103 water quality standards on January 8, 2001.
3. The prohibition does not apply to discharges that are permitted under a U.S. Army Corps of Engineers (ACE) permit issued on or before January 8, 2001 if the discharge is in compliance with the terms of the permit. Under Assembly Amendment 2, this exemption is limited to a person who has received notification from the DNR that the discharge is allowed under a permit issued by the ACE on or before January 8, 2001, and the discharge is in compliance with that permit.
4. The prohibition does not apply if the discharge is the result of an activity that would have qualified for an exemption from a ACE discharge permit under 33 U.S.C. 1344 (f) [sec. 404 (f) of the Clean Water Act] on January 8, 2001 or specified federal agency interpretations of those exemptions in effect on January 8, 2001. Under Assembly Amendment 2, this exemption is limited to a person who has received notification from the DNR that the discharge is the result of an activity that would have qualified for an exemption from an ACE discharge permit under 33 U.S.C. s. 1344 (f) on January 8, 2001 or specified federal agency interpretations of these exemptions in effect on January 8, 2001.

### **TERMINATION DATE OF PROHIBITION**

The substitute amendment establishes that the prohibition on the discharge of dredged or fill material in a nonfederal wetland does not apply on or after July 1, 2001.

Under Assembly Amendment 1, the prohibition described above does not apply beginning on either of the following dates, whichever occurs first:

1. July 1, 2001; or
2. The day after the effective date of legislation that subjects discharges of dredged or fill material into nonfederal wetlands to a certification process that includes provisions that afford protection to nonfederal wetlands that is comparable to, or more protective than, the protection afforded under the federal program in existence on the day before the *SWANCC* decision. This federal program is the federal water quality certification and permitting process under SECS. 401 (a) and 404 of the Clean Water Act that applied to nonfederal wetlands on January 8, 2001.

## **ENFORCEMENT**

Under Assembly Amendment 2 to the substitute amendment, a person who violates the prohibition against the discharge of dredged or fill material into a nonfederal wetland under s. 281.163, as created by the substitute amendment, is subject to penalties under s. 281.98 (1), Stats., which include a forfeiture of not less than \$10 nor more than \$5,000 for each day that the prohibition is violated.

Also under Assembly Amendment 2 to the substitute amendment, the Department of Justice must enforce the prohibition against the discharge of dredged or fill material into a nonfederal wetland under s. 281.163, as created by the substitute amendment, under its authority contained in s. 299.95, Stats.

Adoption of Assembly Substitute Amendment 1 was recommended by the Assembly Committee on Environment by a vote of 6, Ayes, 4, Noes, on March 15, 2001. Assembly Amendments 1 and 2 were adopted by the Assembly on a voice vote on March 20, 2001.

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